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No. 1045

Supreme Court of the United States

October Term, 1962

MILLARD VANCE, ET AL.,
Petitioners,

vs.

MIDLAND ENTERPRISES, INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE JUDICIAL DISTRICT OF OHIO (HAMILTON COUNTY)

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Supreme Court of the United States

October Term, 1962

MILLARD VANCE, THOMAS H. CHILDERS, F. M. COOK, VAUGHN BORDERS, ARNOLD PHILLIPS, ROCCO CAPNA, E. W. KITCHEN, LESLIE J. EVANS, JOHN KIRALY, LUTHER BARNETT, HOMER HARDIN, HELEN W. COOK, EZRA BISHOP, ARTHUR MARTIN, EUGENE COOK, IRELAND L. BOWLING, JOHNNY MARTIN, H. J. BARNHART, HARLAN ELLINGTON, HARRY W. HATFIELD, JACK SHANNON, PALMER GARVER, NATHAN TABOR,
OSCAR SIZEMORE, KYLE H. TAYLOR, FLOYD VARNEY, SHEBY FARMER, IRA JAMES CYFERS,

Petitioners,

vs.

MIDLAND ENTERPRISES, INC., a Delaware Corporation,
The Following persons as TRUSTEES of the RETIREMENT FUND of THE OHIO RIVER COMPANY, and individually, ELI GOLDSTON, NICHOLAS H. CARLOZZI, MORRIS CREDITOR, and A. H. CRANE;
The following persons as the COMMITTEE for the RETIREMENT FUND of THE OHIO RIVER COMPANY, and individually, ELI GOLDSTON, NICHOLAS H. CARLOZZI, MORRIS CREDITOR, A. H. CRANE, J. L. DEAN, and B. R. BENTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIRST APPELLATE JUDICIAL DISTRICT OF OHIO (HAMILTON COUNTY)

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray for a Writ of Certiorari to review the Judgment of the Court of Appeals for the First Appellate Judicial District of Ohio (Hamilton County) and the Ruling of the Supreme Court of Ohio overruling a Motion to Certify the Record entered by said Court on January 23, 1963.

I. THE OPINIONS OF THE COURT BELOW

The Supreme Court of Ohio and the Court of Appeals for the First Appellate Judicial District of Ohio (Hamilton County) did not write Opinions. The Opinion of the Court of Common Pleas of Hamilton County is not reported, and a copy thereof is attached hereto.

II. JURISDICTION

The jurisdiction of this Court to entertain a Petition for a Writ of Certiorari and the allowance thereof is provided for in Judicial Code 28 U.S.C.A. Section 1257 (3).

The date of the Judgment to be reviewed is January 23, 1963.

The Ruling of the Court of Appeals for the First Appellate Judicial District of Ohio (Hamilton County) and the refusal by the Supreme Court of Ohio to grant a Motion to Certify the Record to it for review is contrary to law and in violation of the specific provisions of the congressional enactment as contained in Section 165 (a) of the 1939 Internal Revenue Code and Section 401 of the 1954 Internal Revenue Code.

The jurisdiction of this Court is sustained by Rule 19, Section 1 (a) and (b).

III. STATEMENT OF THE CASE

A summary statement of the matters involved is as follows:

(A) SUMMARY STATEMENT OF THE MATTERS INVOLVED

Midland Enterprises Inc. engaged in business in Ohio from 1929 until 1954. The appellants represent 174 of its employees out of a total of 240. Its business consisted of (1) coal mining in West Virginia and (2) transportation on the Ohio River.

On April 30, 1949, the corporation adopted a Retirement Plan, which was subject to the approval of the Commissioner of Internal Revenue, so as to make its contributions qualify as deductions from Income Taxes.

Section 165 (a) of the 1939 Internal Revenue Code, which is now Section 401 of the Internal Revenue Code of 1954 requires a Trust or Plan under that Section to meet certain qualifications, and, specifically for contributions, to become tax deductible, it had to be "*for the exclusive benefit of his employees or their beneficiaries*" and would qualify;

> "if under the Trust instrument it is *impossible*, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the Trust, *for any part of the corpus or income to be* (within the taxable year or thereafter) *used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;*"

From 1949 until 1953, the company contributed to the Plan, $969,295.00. By reason of the rise in market, this fund, after making all pension payments, by June 30, 1961, had a market value in excess of $1,300,000.00.

In December of 1954, appellee sold its coal mining business and thus "terminated" the 174 employees (appellants) at one time.

From December of 1954 to date, the appellants have been denied benefits or participation in the funds under the Trust. The funds necessary to provide for the employees pensioned at the time of appellants' employment termination, that is, some 30 retired participants, were duly funded and disbursed, and the total funding required about one-third of the assets of the fund.

The other two-thirds or balance of the fund has been applied to the active participants, who remained in the employ of the company, numbering approximately 36, as well as the additional new employees hired by the company from 1954 to date, who, as they attained qualification, pursuant to the terms of the Plan, were made participants of the Plan.

Appellants contend that when 75% of the total group, had their employment "terminated", after they had qualified as participants of the Plan, the funds deducted from Income Tax and contributed into this Trust or Plan were impressed with benefits in their favor and could not be used by the employer for its resulting benefit in fulfilling the needs of providing pensions for its new employees without further contributions. Appellants contend that the construction placed by the Lower Court approving the employer's conduct, in effect, frustrates the express provision of the Federal Statute, which prohibits the employer benefitting from the fund.

A clear illustration thereof is shown by the simple count that when in December of 1954 the employer "terminated" the group of appellants, 174 in number, there remained 37 retired, or shortly thereafter retired, and 29 employees remained on its roll, who had attained three years' service and reached age thirty, making them as eligible to par-

ticipate as the 171 appellants. At the time of the filing of this suit, there were in addition 77 employees of appellee and its subsidiaries, who were listed as participants in the Plan. *Obviously, 48 of the 77 had been hired after December 31 1957 and were reaping the benefits of contributions, which had been made to the "credit" of appellants during their period of employment between 1949 and 1954.* Is this not a clear diversion of funds from the Trust to the benefit of the company in having a Pension Plan for its newly hired employees without one cent of cost to the company?

(B) STATUTES INVOLVED

Internal Revenue Code of 1939, Section 165 (a), and Internal Revenue Code of 1954, Section 401.

Internal Revenue Code of 1939 (26 U.S.C. 165 (a)) § 165.

Employees' trusts

(a) *Exemption from tax.* A trust forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall not be taxable under this supplement and no other provision of this supplement shall apply with respect to such trust or to its beneficiary—

(1) if contributions are made to the trust by such employer, or employees, or both, for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan; [and]

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

Internal Revenue Code of 1954 (26 U.S.C. § 401)

Sec. 401. *Qualified Pension, Profit-Sharing, and Stock Bonus Plans.*

(a) *Requirements for Qualification.*—A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—

(1) if contributions are made to the trust by such employer, or employees, or both, or by another employer who is entitled to deduct his contributions under section 404 (a) (3) (B) (relating to deduction for contributions to profit-sharing and stock bonus plans), for the purpose of distributing to such employees or their beneficiaries the corpus and income of the fund accumulated by the trust in accordance with such plan; [and]

(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries;

* * *

(C) STATEMENT OF MATERIAL FACTS

Under the Summary Statement of Matters Involved, we have given the facts involved in this case. There is no dispute whatsoever, and the facts and Findings of Fact by the Court of Appeals, attached hereto, are accepted. The question may be simplified to the extent of saying by way of example a corporate employer having four operations with twenty-five employees in each, adopts a Retirement Plan, and contributes thereto sufficient amounts over a period of years so that the fund consists of One Million

Dollars and normally sufficient to finance the retirement of the one hundred employees. The employer decides to close three of the departments and to retain one. Thus, it discharges seventy-five employees and keeps twenty-five employees. The employer ceases further contributions to the fund because the One Million Dollar fund not only is sufficient to provide for retirement for the remaining twenty-five employees, but also for as many as seventy-five new employees that it may hire in the years to come.

The Ohio Courts have construed that such action on the part of the employer is not in violation of the specific language of the Internal Revenue Code, Section 401, which requires that such a Plan can only qualify if *"it is impossible at any time * * * for any part of the corpus or income to be * * * used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries."*

Simply stated, may the employer terminate all employees and keep the fund for a future business with future employees? If the creation of a Retirement Plan is presumably beneficial to an employer, and if the maintenance of a Retirement Plan with money created by reason of contributions on behalf of former employees leaves the employer the right to create a new Plan and use such funds, then how can it be said that this does not make it possible for the employer to use such funds?

(D) REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) The Decision of the Ohio Courts completely ignored, and frustrated the provisions and purposes of the Internal Revenue Code and diverted the benefits from the employees to the employer.

(2) The Decision of the Ohio Courts made it possible for an employer, contrary to the express provisions of the Internal Revenue Code, to make use of funds in a Retirement Plan for the benefit of financing its future Retirement Plans for other and new employees.

(3) The Decision in this case is contrary to Ohio Law, as established by *Cantor* v. *Berkshire Life Insurance Co.*, 171 Ohio St. 405, and is contrary to Federal Law, as contained in Section 165 (a) of the 1939 Internal Revenue Code, Section 401 of the 1954 Internal Revenue Code and the Decision in *Finnell* v. *Cramet, Inc.*, 289 F. 2d 409.

IV. ARGUMENT

The portion of the Record relied upon is the Conclusions of Fact and Conclusions of Law of the Court of Appeals, together with the Exhibit attached thereto. The pertinent sections of the Plan, requiring the Court's consideration, are Articles XVI and XX.

Article XVI reads as follows:

> "This Plan is strictly a voluntary undertaking on the part of the Company and shall not be deemed to constitute a contract between the Company and any employee or to be considered for, or an inducement to, or a condition of, the employment of any employee. Nothing contained in the Plan shall be deemed to give any employee the right to be retained in the service of the Company or to interfere with the right of the Company to discharge or retire any employee at any time. Inclusion under the Plan will not give any employee any right or claim to a retirement benefit except upon reaching his retirement date and then only to the extent such right is specifically fixed under the terms of the Plan and there are funds available therefor in the hands of the Trustee."

Article XX, Section 2, reads as follows:

> "Section 2. *Consequences of Termination.* If the Company terminates its contributions to the Trust Fund, or if the Trust shall terminate for any reason, including illegality or invalidity, the Trust Fund then held by the Trustee shall be used and applied for the benefit of the Participants who have retired under the Plan (including their Contingent Annuitants, if any), and active Participants who at the date of termination of contributions are included in the Plan, in the following order:—
>
> "FIRST:—The Trust Fund shall be applied for the benefit of retired Participants under the Plan (including their Contingent Annuitants, if any), upon the basis of the actuarial costs of their retirement benefits. If the amount in the Fund is insufficient to provide such actuarial costs in full, then it shall be allocated to each retired Participant in the proportion which the actuarial cost of his retirement benefit bears to the total actuarial cost of such benefits for all retired Participants.
>
> "SECOND:—If any balance of the Trust Fund shall remain, such balance shall be applied for the benefit of active Participants upon the basis of the actuarial costs of their retirement benefits accrued pro rata for service to the date of termination of contributions. If the balance of the Trust Fund is insufficient to provide such actuarial costs in full, it shall be allocated to each active Participant in the proportion which the actuarial cost of his accrued retirement benefit bears to the total actuarial cost of such benefits for all active Participants."

Appellants claim rights under the Plan by reason of the provisions of Article XX, which, in effect, outlines a method of distribution of the Trust Fund if an event occurs similar to what happened in the present case. We contend that Article XVI applies only in the ordinary operation and

carrying on of the Plan. It does not assure the employee of continuous employment. It does not guarantee the employee continuance in the employ of the company simply by reason of having reached age thirty and having been employed for three years. All things being equal, the employer in the management of its business has a right to discharge, terminate or lay off any employee for reasons of business or, perhaps, without fraud or evasion, for no reason. When the business terminates, or a branch of the business terminates; the employer cannot keep the assets in the fund and apply it to the remaining employees or to new employees. This is a diversion of the fund for the benefit of the employer, which the Federal Law strictly prohibits; the same Federal Law under which the very Plan was formulated and, upon the application whereof, the Plan was conditioned.

The employer excuses the non-action on the part of its Board of Directors in terminating the Plan even though it has made no contribution for nine years, upon the actuarial report that no contributions were needed during the nine years. No contributions were needed if the credit due to the 174 appellants were diverted for the benefit of the new employees, but, if the employer cannot use the credits due appellants to make the Plan actuarially sound for the benefit of new employees, then, of course, contributions were needed. Clearly, this illustrates how the employer benefits from the fund; a benefit prohibited by the Federal Statute. In the Court of Appeals, the parties stipulated the reports made by the actuaries. We direct your attention to their report as of December 31, 1954, showing that during that year there were 240 employees covered under the Plan, and 174 were discharged, leaving 66 employees. At that time, 31 had been retired, and, by the end of that year, there remained 30 retired employees and 62 active employees. The first question that may be

asked is: Is it fair, just or equitable in the administration of the Trust to take the contributions applicable to 240 employees and apply them for the benefit of 30 retired and 62 active? The same report indicates that out of a total fund liability of Nine Hundred Forty-three Thousand Seven Hundred Ninety Dollars, Four Hundred Thirty-six Thousand Seven Hundred Twenty-nine Dollars was set up for the retired or pensioned employees. By what reason is it justified that the balance of Five Hundred Seven Thousand Sixty-one Dollars be held for the benefit of the remaining 62 active employees, and all rights completely terminated and cut off for the 174 discharged employees?

This same report indicates that with the retirement through discharge of Seventy-four Per Cent of the eligibles, the fund attained an actuarial gain of Six Hundred Three Thousand Five Hundred Forty-seven Dollars. When the stipulation as to the report for the succeeding year is examined, that is, December 31, 1955, we find that by the end of the year there remained but 45 active employees and 36 retired. Five new employees had been added during the year. What justification is there for taking the benefits of the appellants and applying them to the benefit of these 5 new employees. Assuming that pension rights of employees redound to the benefit of the corporation, and we believe such an assumption is reasonable, has not the employer corporation obtained the benefits from the fund by adding its 5 new employees thereto?

In the year 1956, 7 new employees were added to the Pension Plan, and in the year 1957, 27 new employees were added. In the year 1958, 4 new employees were added, and in the year 1959, 4 new employees were added. Keeping in mind that no contributions have been made by the employer to the fund, as shown by this record, ever since 1953, and during the term of years, of the class of 31 on retirement in 1954, 23 of them have terminated as

participants by reason of death, it is clearly shown that the maintenance of the fund is not for the benefit of the appellants, who were participants with vested rights in December of 1954, but rather for new employees of the employer.

ARGUMENTS OF LAW

The instant case presents no controverted facts, but only questions of law. When the corporate employer decided in 1949 to create a Pension Plan, it was not obligated to do so. When it, however, decided on the creation of the Plan, it made it conditional on its being approved by the Commissioner of Internal Revenue and qualified as tax deductible for its contributions. It set forth certain requirements for qualification by employees to become "Participants" in the Plan. These requirements or qualifications included a three year service, thirty years of age, and an employment not covered under a Collective Bargaining Agreement. It is admitted that all of the appellants met the qualifications and became active participants.

The admitted facts clearly establish that there was no obligation on the company to continue the contributions. The company could discontinue or terminate contributions to the Trust Fund. There is no contention that the company could not discharge or terminate the employment of employees with or without cause. The discharge of an employee or the termination of an employee's employment in the ordinary course of business was all that is included under the terms of the Pension Plan, Article XVI. Clearly, that Article covers the situation between the employer and "any employee." It does not undertake to define or cover the situation between the employer and "all the employees." The distinction between any employee and all the employees is quite clear and obvious. In the ordinary course of its business, the employer can employ

any employee and terminate or discharge any employee without any consequences. If the employee has reached retirement under this Plan, he would be entitled to benefits; if he had not reached retirement, he would not be entitled to the benefits.

The Lower Court Decision is founded entirely on this Article XVI as meaning that it applies equally, whether the employer terminates 1 employee or 174 employees. With this, we take issue. If the Lower Court is right, then it would make no difference if instead of 174 employees, on the same day in December of 1954, the employer had terminated the total of 240 employees. Would the only claim on the total fund have been the 31 employees, who, at that time, had reached retirement age and no claim on the part of the other 209 employees? If that is so, and actuarially it required Four Hundred Thousand Dollars out of a fund of One Million Three Hundred Thousand Dollars, to assure payment to the 31 employees, who would receive the remaining Nine Hundred Thousand Dollars? The employer? Certainly, that is forbidden by law and is contrary to equity and any possible theory applicable to Trust Funds. Where does the difference arise if instead of 240 employees being discharged at one time, when only 31 have reached retirement at said time, there is a discharge of 174 employees or *all the employees of the coal mining end of the business?* If the surplus fund above mentioned of Nine Hundred Thousand Dollars, after crediting Four Hundred Thousand Dollars for those having reached retirement, is applied for the benefit of newly hired employees of the employer in such a manner and for such a purpose so that the company may have the luxury of a Pension Plan at the cost of the former employees, is that not a diversion of the funds for the benefit of the company and contrary to the very rules upon which the Plan was established?

We strongly urge that Article XVI has no application to the question involved in the present case. We contend that Article XX, Section 2, is the pertinent and applicable part of the agreement. Clearly, the corporation had made contributions between 1949 and 1953. In 1953, when it made its last contribution, and in the nine years thereafter when it made no contributions, it just effectively complied with Article XX, Section 2, which states: "If the company terminates its contributions to the Trust Fund." A Court should not hold that the failure to continue contributions for nine years did not constitute a termination of contributions because the Board of Directors did not adopt a Resolution saying "we terminate." When you do not do a thing for nine years, it just is not done because it just has not been done even though you did not say "I am not doing it." The Article further provides: "or if the Trust shall terminate for any reason." Certainly, if the Trust is divided into two parts with the one part covering 174 employees in the West Virginia coal mines and the other part consisting of approximately 35 active employees on the Ohio River, the closing out of the coal mining business for the employees employed therein, the Trust has terminated. Certainly, it is not intended to take that portion of the Trust set up for those employees and use it for the other remaining employees or for newly hired employees.

We, therefore, state that Article XX, Section 2, is the one that was ignored by the Lower Court, but is the one applicable in the instant case. That Section says that the consequences of termination for any reason are that the fund is to be divided, first, to those who have reached retirement, and the balance for *"active Participants who at the date of termination of contributions are included in the Plan."* This clearly includes the appellants as well as the 35 remaining active employees of the company.

Ohio law applicable to this case is clearly *Cantor* v. *Berkshire Life Insurance Co.*, 171 Ohio St. 405; 14 Ohio Op. 2d 157. The *Cantor* case, approved the prior Decision in *Mabley & Carew Co.* v. *Borden*, 129 Ohio St. 375. It did not approve *Sigman* v. *Wurlitzer Co.*, 57 Ohio App. 4, and *Wilson* v. *Wurlitzer Co.*, 48 Ohio App. 450, nor *Wallace* v. *Northern Ohio Traction and Light Co.*, 57 Ohio App. 203, although the Record in that case clearly shows that the defendant in that case relied on those three cases. The nearest to even mentioning any one of those cases in the Opinion in *Cantor* is the quotation from *Bird* v. *Connecticut Power Co.*, 144 Conn. 456, in which case the Connecticut Court referred to *Wilson* v. *Wurlitzer Co.*, 48 Ohio App. 450. What the Supreme Court of Ohio laid down as the present majority rule and established as a rule in Ohio is as shown in its Opinion:

> "*A retirement program has become a basic part of an employee's remuneration even as his wages are a part thereof, and a consideration flows to the employer as well as to the employee through such a program.*
>
> "Clearly, under our present economic system, an employer cannot offer a retirement system as an inducement to employment and, after an employee has accepted employment under such circumstances, withdraw or terminate the program after an employee has complied with all the conditions entitling him to retirement rights thereunder.
>
> "*Therefore, whether a retirement plan is contributory or noncontributory and even though the employer has reserved the right to amend or terminate the plan, once an employee, who has accepted employment under such plan, has complied with all the conditions entitling him to participate in such plan, his rights become vested and the employer cannot divest the employee of his rights thereunder.*" (italics ours)

This case is unlike *Finnell* v. *Cramet, Inc.*, 289 F. 2d 409, where some 6 employees, who had been hired anywhere from one to three years, were not permitted to participate in the distribution of the Pension Fund. The corporation, however, after setting aside the amount actuarially necessary for those employees, who had retired, distributed the remainder of the fund among the active participants, who had not reached retirement age. The Court approved such a plan of distribution, and denied the claim of the new employees, who had no claim under any of the terms of the Contract.

In 42 *Ohio Jur.* 2d, Section 5, at Page 359, it is stated:

> "Private companies may, and frequently have, set up pension plans for their employees, which are generally considered as a continuing inducement to employees to continue their loyal service to the company, with such continued service constituting the consideration, for the pension, moving from the employee. Accordingly, such a pension plan is ordinarily deemed to impose an obligation upon the employer for the payment of the pension which cannot be evaded upon mere whim or caprice or for other than substantial reasons. The company or employer may, however, be relieved of its obligation where it is forced to discharge an employee for insubordination, disloyalty, or other fault."

The notes to the above quoted text cite the very authorities upon which we have relied in our Brief. Additional cases recently decided all follow the same rules of law. In *Ball* v. *Victor Adding Machine Co.*, 236 F. 2d 170, the Court held that a Pension Trust is not a mere gratuity, but would appear to be as much part of the employee's wages as money paid him at the time of rendition of his services.

In *Bird* v. *Connecticut Power Co.*, 133 A 2d 894, the Court held that a Board of Directors cannot legally strip employee of benefits of a Pension Plan where the employee has complied with the terms of the offer of a Pension.

In *Bakenhus* v. *Seattle*, 296 P 2d 536, the Court held that a Pension Plan gave rise to contractual obligation.

In *Frietzsche* v. *First Western Bank and Trust Co.*, 168 Cal. App. 2d 705, 336 P 2d 589, the Court held that Pension Plans are to be liberally construed in favor of employee.

V. CONCLUSION

Based upon the Record in this case, it is clearly established that the appellee corporation set up a Pension Plan, sought and obtained the approval of the Department of Internal Revenue, thus permitting and allowing its contributions to the Plan to be deductible from Income Tax and, in effect, resulting in a saving of Fifty-two (52%) Per Cent of the amount contributed as tax deduction. In other words, out of the Nine Hundred Seventy Thousand ($970,000.00) Dollars contributed by the employer from 1949 to 1953 to the Retirement Fund and deducted from Federal Tax Returns, Fifty-two Per Cent thereof constituted a tax saving, and Forty-eight Per Cent thereof was the net cost to the corporation. The Plan specifically provided in order to comply with the Internal Revenue Code (Article XIV of Plan):

> "At no time * * * shall any part of the corpus of the Trust or of the income thereof be used for, or diverted to, purposes other than for the exclusive benefit of Participants; * * *."

The Decision of the Lower Courts, in effect, permitted the diversion of funds, which had been deducted from

Income Tax and credited to the appellants, as participants, to be used for the benefit of the corporation by setting up retirement benefits for employees who entered its employ subsequent to December of 1954.

The question involved in this case is of great and general public interest. The Court will judicially notice that millions of employees are covered by Pension Plans. Without a great deal of research, it can be well established that the language and formulas and restrictions contained in the Pension Plan involved herein is fairly uniform in language and is included in a great majority of the Pension Plans. The exact question has not been decided unless the Decision in *Cantor* v. *Berkshire* is the answer.

VI. RELIEF SOUGHT

Wherefore, it is respectfully submitted that this Petition for a Writ of Certiorari to review the Judgment of the Court of Appeals for the First Appellate Judicial District of Ohio (Hamilton County) and the refusal of the Supreme Court of Ohio to review the same should be granted by this Court. This is a case, calling for the exercise by this Court of its supervisory powers in order that (a) the Decision by a State Court being in conflict with the Statutes and the Decision of Federal Court in matters falling under the Internal Revenue Laws, and (b) an important question of general law having been decided in a way probably untenable and in conflict with the weight of authorities, and (c) an important question of Federal Law; which has not been, but should be, settled by this Court, and (d) the State Court having decided a Federal question in a way probably in conflict with applicable Decisions of this Court; it may be properly reviewed, and that, to such an end, a Writ of Certiorari should be granted, and this Court should

review the Decision of the Court of Appeals for the First Appellate Judicial District of Ohio and finally reverse it.

/s/ SOL GOODMAN
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Of Counsel:
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RONALD JAY GOODMAN

APPENDIX

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-181911

MILLARD VANCE, ET AL.,
Plaintiffs,

vs.

MIDLAND ENTERPRISES, INC., a Corporation, Et Al.,
Defendants.

OPINION

RENNER, J.:

This is an action for a declaratory judgment to compel the defendants to return all of the assets and securities of a certain Retirement trust fund to a Trust Bank within the jurisdiction of this Court and for other relief. The plaintiffs are former salaried employees of West Virginia Coal and Coke Corporation and as such claim an interest in the fund. The trust fund and retirement plan was created by that company and all of the money contributed to the fund was furnished by the Company. Through several mergers and change of name West Virginia Coal and Coke Corporation was absorbed and was known as Midland Enterprises, Inc. when this action was filed.

The amended petition alleges numerous acts on the part of the defendants which plaintiffs allege were in violation of their rights and vested interests in the trust fund. The prayer is for a mandatory injunction directing the

defendant trustees to return all of the trust assets and securities to a Trust Bank within the jurisdiction of this Court; for the appointment of a receiver to have custody and control of such assets and securities under order of this Court until final termination of this suit; for accounting by the defendants for all assets of the trust fund as of November 30, 1953, including all earnings of the fund and accretions thereto; for liquidation of the Trust Fund and distribution thereof according to Article XX, Section 2, of the plan; and for such other orders and judgments including money judgments against the defendants individually as the Court shall find to be just and equitable.

On October 3, 1961, by agreement of counsel and order of this Court, Case No. A-183507 was consolidated with this action, the consolidated action to proceed under the number and title of this case.

At the July term of this Court an extended hearing was had on the application of the plaintiffs for a mandatory injunction and for the appointment of a receiver of the retirement fund pending the final determination of this suit. At this hearing the plaintiff called one of the defendants, Nicholas H. Carlozzi, on cross-examination. The other evidence presented on behalf of the plaintiffs and the defendants consisted of stipulations and exhibits as shown by the transcript of those proceedings held on July 17 and 18, 1961.

After oral argument the matter was submitted to the Court and exhaustive briefs in support of their respective contentions were filed by counsel.

Thereafter, on August 3, 1961, the Court rendered a Memorandum Opinion finding that the plaintiff had failed to establish a right or a vested interest in and to the retirement fund, and the application for a mandatory injunction and the appointment of a receiver for the trust fund pendente lite, was denied.

The motions for summary judgments, now under consideration, are submitted on the pleadings and the evidence consisting of affidavits and stipulations filed herein and exhibits attached thereto and also upon the oral evidence and the exhibits previously received in evidence at the hearing on the application for injunction and receiver on July 17 and 18, 1961.

The evidence thus presented on the two motions for summary judgment does not present any issues of law and fact other than those which were heretofore considered by this Court on the application for the temporary injunction and for a receiver. The briefs which counsel have submitted on the motions under consideration here are similar to those submitted on the application for injunction and receiver. They present no argument or authority other than those considered heretofore by the Court.

The reasoning and conclusions contained in the Memorandum Opinion rendered herein on August 3, 1961, by this Court, are determinative of the issues presented here.

The plaintiffs' motion for a summary judgment should therefore be overruled and the defendants' motion should be granted.

Please present an entry or separate entries accordingly.

APPEARANCES:

J. Earl Pratt and
Goodman and Goodman,
Attorneys for Plaintiffs.

Paxton and Seasongood,
Attorneys for Defendants.

December 29, 1961.

(CAPTION OMITTED)

MEMORANDUM OPINION

RENNER, J.:

The matter for consideration here is the application of the plaintiffs for a mandatory injunction and for a receiver pending the final determination of this action.

The application sets forth a number of past and contemplated acts on the part of the defendants which the plaintiffs contend will impair or cause them to lose certain rights and interests in a retirement fund which is held in trust under a retirement plan of the West Virginia Coal and Coke Corporation and subsidiaries, which fund was established on or about January 1, 1940.

The fundamental and basic question for determination here is whether or not the plaintiffs have a vested interest in the retirement fund created by the West Virginia Coal and Coke Corporation.

The plaintiffs contend and the defendants concede that all of the plaintiffs are former employees of the West Virginia Coal and Coke Corporation; that each of them was employed by it on November 30, 1953 and continuously through December 12, 1954; that all of them had reached their thirtieth birthdays and had been continuously employed by that company for more than three years on November 30, 1953.

Defendants also concede that all of the plaintiffs except Palmer Garver, were in work classifications which made them eligible for retirement pension.

The defendants further concede that on or about December 12, 1952 the mining properties of West Virginia Coal and Coke Corporation; at or near Omar, West Virginia, where the plaintiffs were then employed, were sold and that the plaintiffs' services with it were then or shortly

thereafter terminated by the Company and have not been resumed. The evidence also discloses that the plaintiffs were taken over as employees of company which had purchased the West Virginia mining properties.

Evidence was also presented on behalf of the defendants, which was not rebutted by the plaintiffs, to show that the Omar, West Virginia operations for the two preceding years before 1954 and also for the year of 1954 had lost substantial amounts of money and that the Coal and Coke Corporation sold such properties to eliminate further losses to the company.

The plaintiffs concede that none of them at the time they were discharged had reached the normal retirement ages set forth in Article VI of the Retirement Plan.

Plaintiffs contend that their employment with the company met the requirements of the provisions of Article III of the Retirement Plan and thereby each of them had acquired a vested right or interest in the fund prior to the severance of their employment upon the sale of West Virginia properties.

In support of this contention that the plaintiffs' had acquired a vested interest in the fund counsel for plaintiffs cites the recent Supreme Court decision in *Cantor* v. *Berkshire Life Insurance Company*, 171 O.S. 405, 14 O.O.(2nd) 157.

In 1947 Cantor entered into what is referred to as a "career contract" with Berkshire Life. In September, 1956, Cantor, having reached the agreed retirement age and having fulfilled all the other conditions required under the contract, requested permission to establish his retirement or specifically to waive his insurance production requirements, which request was granted effective January 17, 1957. Then shortly after Cantor's retirement was granted and after the agreed date of his retirement, Berkshire attempted to cancel his contract, the effect of which

would have been to destroy his right to receive personal continuity credit commissions, thus lowering the minimum amount Cantor would receive under his retirement.

It is apparent that the facts in the Cantor case and the instant case are readily distifiguishable.

The Supreme Court in Cantor vs. Berkshire Life, supra, at pages 408 and 409 (OS) discusses the substantial changes that have taken place in recent years in the concept of employees' rights and of the place of the so-called fringe benefits in relationship to employees' remuneration.

The Court suggests that perhaps due to the increased span of life, retirement benefits have assumed a more important role in the minds of employees when they accept employment. Then from the view point of the employer the Court suggests that management has inaugurated retirement programs to encourage and induce career service and to minimize labor turnover so costly to industry.

It is unreasonable to conclude that the West Virginia Coal and Coke Corporation, when it established the retirement plan, could have expected the limited requirements of age 30 and 3 years of continuous employment, alone, to induce and provide for it a stable and contented labor force and thus minimize the costly labor turnover.

In construing the retirement plan the Court must look to the terms and provisions of the whole plan and not alone to Article III to arrive at the intent of the company and what must have been the reasonable interpretation by the employees of the terms and provisions of the retirement plan.

Counsel for defendants cite *Wallace* v. *Northern Ohio Traction and Light Company*, 57 O.A. 203, 10 O.O. 354. This case was decided by the Judges of the Hamilton County Court of Appeals, sitting by designation in the Ninth Appellate District.

The syllabus of that case reads:

> "An employer may, at any time before the employee actually qualified under the terms of an offer of pension, withdraw the offer, and those employees who have not actually qualified for the pension at the time the offer is withdrawn are not entitled to the pension. Substantial compliance with the terms of an offer of pension, if it be less than actual qualification thereunder, does not constitute such an acceptance that will bind the employer to pay the pension if he, in good faith, discharges the employee before actual qualifications."

At page 211 (OA) the Court discussed the question presented in that case. The conclusions which the Court reached concerning the inducements to the employee and to the company, respectively, are consistent with the expressions heretofore referred to in this opinion of the Supreme Court in the Cantor case supra. Furthermore the decision of the Court of Appeals in the Wallace case is entirely consistent with the decision of the Supreme Court in the Cantor case.

Applying the law and the reasoning of the Court in the Wallace case, supra, to the facts in the instant case, this Court reaches the conclusion that continuous employment until the age of retirement was an essential element of the retirement plan and that although plaintiffs had met the requirements of three years continuous employment and had attained their thirtieth birthday at the time of the severance of their employment by the company, they did not acquire a vested right or interest in the trust fund.

Counsel for plaintiffs also contends that the failure of the West Virginia Coal and Coke Corporation to contribute to the trust fund after November 30, 1953 constituted a termination of the retirement plan and that by virtue of the provisions of Article XX, Section 2, the plaintiffs had

acquired a vested right or interest in the trust fund as active participants.

The defendants deny that the company had terminated the retirement plan in November, 1953, or any other time, but admit that ever since that time it had suspended payments or contributions to the trust fund.

In support of its contention the company points to Article XIX, Section 2 concerning contributions to the trust fund. Section 2, in part, recites that: "The company intends the plan to be a permanent, as distinguished from a temporary, program, saving to itself, however, the rights specified under Article XX hereof."

Article XX, among other things, provides that: "The company reserves the right at any time or times, by action of the Board of Directors, to terminate its Contributions and to modify or amend the Plan in all or any part, by delivery to the Trustee of a certified copy of the resolutions of the Board of Directors specifying such termination, modifications or amendments."

Section 2 of Article XIX further provides that the plan should be for the exclusive benefit of its participants and that the company expects to contribute to the trust fund the amounts which will provide in full the retirement benefits payable under the plan. In this connection, Section 2 further provides that the company may rely on the estimates, made by the committee based upon the reports and advice of the actuary, of the amounts of the contributions needed to carry out the plan. It then closes with the provision that the company nor the committee nor the trustees shall be liable in any manner, if the trust fund shall be insufficient to provide for the payment of the retirement benefits and that such benefits are to be payable from the trust fund and only to the extent that the trust fund shall suffice for the purpose.

The defendants presented evidence that the retirement fund had been very materially enhanced prior to and after November 30, 1953, and that the fund had increased in value since that time from approximately $900,000.00 to approximately $1,100,000.00, that in view of this enhancement and upon reliance upon the estimates made by the committee based upon the reports and advice of the actuary, the company suspended further contributions because the fund was actuarily sound; that the company has at no time terminated the plan, as provided in Article XX, by action of the Board of Directors and delivery to the trustee of the certified copy of the resolution of the Board of Directors specifying the termination and that it has not terminated the plan in any other manner.

Counsel for the defendants contends that the trust fund from and after November 30, 1953 was not actuarily sound for the reason that the company had not from December 12, 1954 nor has it at any time since, considered any of the plaintiffs as participants having any right or future claim to retirement benefits. At the hearing counsel for the defendants admitted that, after the sale of the West Virginia Coal properties and the employment of the plaintiffs by the company which bought the properties, the Coal Company had not considered the plaintiffs in this action as participants entitled to a pension retirement after their services were terminated. Plaintiffs, however, failed to produce any evidence to support this contention that the retirement fund was not actuarily sound after November 30, 1953.

On the issue as to whether the West Virginia Coal and Coke Corporation had terminated the plan, the Court reaches the conclusion that the plan was not terminated by the Coal and Coke Corporation and that the Corporation in good faith merely suspended further contributions until such time as the trust fund may be in need of it.

The Court, therefore, reaches the conclusion that the plaintiffs have failed to establish an interest in and to the trust fund on or after November 30, 1953 or at any time from and after their discharge from employment by the West Virginia Coal and Coke Corporation and that in the absence of any vested interest in the fund the mandatory injunction and the appointment of a receiver which they seek by the application filed by them on July 17, 1961, should be denied.

Please present an entry accordingly.

APPEARANCES:

J. Earl Pratt
409 Center Street
Ironton, Ohio
Attorney for Plaintiffs

Paxton and Seasongood
Attorneys for Defendants

August 3, 1961.

CONCLUSIONS OF FACT AND CONCLUSIONS OF LAW OF THE COURT OF APPEALS, HAMILTON COUNTY, OHIO

This matter comes before this Court on the application of the plaintiffs-appellants (hereinafter called "plaintiffs") to state on the record the Conclusions of Fact in this cause, found separately from the Conclusions of Law, after the Court had rendered its opinion that a decree similar to a decree entered in the Court of Common Pleas should be entered in this Court. Pursuant to said application this Court makes the following Conclusions of Fact and Conclusions of Law.

CONCLUSIONS OF FACT

1. This cause comes before this Court on an appeal by plaintiffs on law and fact from the Entry Granting Defendants' Summary Judgment and entering judgment for defendants in the consolidated case No. A-181911 wherein Millard Vance and others were plaintiffs and Midland Enterprises, Inc., a Delaware corporation, et al, were defendants, and No. A-183507 wherein Oscar Sizemore, et al, were plaintiffs and Midland Enterprises, Inc., a Delaware corporation, et al, were defendants. The plaintiffs in both cases are plaintiffs-appellants and the consolidated case is designated in this Court under the above caption and number.

2. Plaintiffs are former employees of West Virginia Coal and Coke Corporation, a West Virginia corporation (hereinafter sometimes referred to as "West Virginia"), the original predecessor of Midland Enterprises, Inc., a Delaware corporation, defendant-appellee herein. All of said plaintiffs ceased to be employees of West Virginia on or about December 12, 1954.

3. The defendants-appellees, Eli Goldston, Louis R. Fiore, Morris Creditor and A. H. Crane are Trustees of the Retirement Fund of The Ohio River Company, and they and J. L. Dean, and B. R. Benter, also defendants-appellees, are the Committee for the Retirement Plan of The Ohio River Company, the present successor with respect to the Retirement Plan originally established by West Virginia.

4. West Virginia was incorporated on July 24, 1929. From 1929 to 1954 it was engaged in the business of mining and selling coal, in the operation of mercantile stores, the ownership and management of extensive bituminous coal lands in northern West Virginia, which at that time were for the most part undeveloped and, through its subsidiary,

The Ohio River Company, in transportation on the inland waterways. In December 1954 West Virginia sold its business of mining and selling coal and early in 1955 it sold its mercantile stores business. It remained in inland waterways transportation and commenced the promotion and development of its northern West Virginia coal lands. It also entered the river equipment leasing business although all its equipment was ultimately leased to The Ohio River Company. In 1955 West Virginia entered the apartment house business through the acquisition and management of an apartment house. In 1956 West Virginia changed its name to Midland Enterprises, Inc.

5. Midcnt Corp. was incorporated in the State of New York on October 16, 1956, as a wholly owned subsidiary of Midland Enterprises, Inc., the West Virginia corporation. On November 23, 1956 said Midland Enterprises, Inc. was merged into Midcnt Corp. and Midcnt Corp., at the time of such merger, changed its name to Midland Enterprises Inc., a New York corporation.

6. On August 22, 1961 a reorganization was effected between Eastern Gas and Fuel Associates, a Massachusetts voluntary association, and Midland Enterprises Inc., the New York corporation, as a result of which Midland Enterprises Inc., a Delaware corporation, the present defendant-appellee, which is a wholly owned subsidiary of said Eastern Gas and Fuel Associates, has acquired substantially all of the assets and assumed substantially all of the liabilities of said New York corporation. After said reorganization The Ohio River Company became a wholly owned subsidiary of said defendant-appellee, and the Trustees of the Retirement Fund and the members of the Retirement Plan Committee of Midland Enterprises Inc. became the Trustees of the Retirement Fund and the members of the Retirement Plan Committee of The Ohio

River Company, the successor to said Midland Enterprises Inc. with respect to said Retirement Fund.

7. On or about April 30, 1949 West Virginia adopted a Retirement Plan (sometimes hereinafter referred to as the "Plan"), a copy of which, with all the amendments thereto to December 12, 1954, is attached hereto marked Exhibit A and made a part hereof. (The amendments stapled to the last page of said Exhibit A were adopted February 18, 1955 and the other amendments shown in said Exhibit A were adopted on or before November 23, 1954.) On or about April 30, 1949 all eligible employees, whether participating or not, were given copies of the Plan in the form of Exhibit A but without the amendments noted thereon, and subsequent employees of West Virginia and of its successors and its and their subsidiaries who were eligible to participate therein were given copies of the Plan with amendments to the date of their employment. The copies given to said employees contained the Outline of Principal provisions appearing in said Exhibit A.

8. A copy of the Trust Agreement referred to in the Plan, with all the amendments thereto to December 12, 1954, is contained in Exhibit 3 of the hearings in the Common Pleas Court, to which reference is hereby made.

9. All payments made into the Trust Fund under the Trust Agreement were made by West Virginia up to and including November 30, 1953. None of the plaintiffs-appellants or any other employees of West Virginia or of its successors or of its or their subsidiaries have at any time made any payments to said Trust Fund. The total payments made by West Virginia to the Trust Fund from 1949 through 1953 were $969,295.00. No contributions to the Trust Fund were made by anyone thereafter.

10. From the inception of the Plan West Virginia and its successors and the duly appointed Retirement Plan Committee employed and designated Marsh and McLen-

nan of Chicago, who were and are qualified consulting actuaries in the pension business, to make reports to it of the actuarial valuation of the Plan. These reports provided for no contributions by West Virginia or Midland to the Trust Fund for the calendar years 1954 through 1959, inclusive, for the reason that said actuaries found in their reports for the respective years that the Plan was fully funded, and the Trust Fund contained an actuarial surplus.

11. At the end of the year 1954 the securities and cash comprising the Trust Fund had a market value of approximately $900,000.00.

12. On June 30, 1961, after making all pension payments then due to persons who had qualified for pensions under the Plan, the securities and cash in the Trust Fund had a market value in excess of $1,300,000.00.

13. The reason for the sale by West Virginia in 1954 of its coal mining properties was that it was not economically sound for West Virginia to continue operating the mines. For a number of years prior to such sale West Virginia had lost substantial sums of money on its mine operations. In 1952 West Virginia lost almost $15,000.00 from coal operations, in 1953 over $355,000.00 and in 1954, up to December 12, over $780,000.00.

14. On January 1, 1954 there were 240 active participants in the Plan and 24 retired who were receiving pensions. During the year there were one death, seven retirements and 174 terminations, including all the plaintiffs except one whose termination occurred on January 15, 1955, among the active participants. At the end of December 12, 1954 after termination of employment of employees who were employed in West Virginia's mining operations, including all the plaintiffs except one, there were still 109 employees of West Virginia and its subsidi-

aries who were or might become eligible to participate in the Plan, of whom 72 were participants in the Plan.

15. As of December 31, 1954 there were 30 retired participants receiving pensions from the Trust Fund. As a result of the sale of the coal mining business and mercantile stores 11 additional employees retired from December 31, 1954 to July 1, 1955 and received retirement benefits from the Trust Fund. The continuing employees of West Virginia, Midland Enterprises Inc. and their respective subsidiaries entitled to pensions pursuant to the provisions of the Plan have been receiving pensions as they respectively reach the retirement age as employees of any of said companies.

16. Both the Plan and the Trust Agreement as amended from time to time were at the time of this appeal and are still in effect and continue in operation.

17. None of the plaintiffs at the time of the termination of his or her employment had reached the age which entitled them to receive pensions pursuant to the provisions of the Plan.

18. At no time has the Board of Directors of West Virginia or its successors taken any action to terminate the contributions of any of said companies to the Trust Fund. At no time has a copy of any resolution of the Board of Directors of West Virginia or of any of its successors terminating contributions to the Trust Fund been adopted or delivered to any Trustee or successor Trustee under the Trust Agreement.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of this case on an appeal on law and fact from a consolidated case, as set forth in the Conclusions of Fact, from the Common Pleas Court of Hamilton County, Ohio.

2. The contract, if any, between the plaintiffs and West Virginia, which has been assumed by its successors, including The Ohio River Company, is contained in Exhibit A hereto attached.

3. There was good reason for the termination of employment of plaintiffs by West Virginia on or about December 12, 1954.

4. It was not necessary for West Virginia to make any contributions to the Plan during the year 1954 because of the finding by the actuaries designated and employed by West Virginia and the Retirement Plan Committee thereof that on December 31, 1954 the Plan was fully funded and the Trust Fund had an actuarial surplus.

5. An employee of West Virginia who was a participant in the Plan, but had not under its terms become entitled to retirement pay at the time his employment was terminated, had no interest in the Trust Funds held by the Trustee pursuant to the terms of the Plan that would continue after such former employee ceased to be an employee.

6. The Plan was not terminated in December 1954 nor thereafter, but has continued in effect and has prior to and since said date been administered according to its terms.

7. With respect to a plan containing the terms of Exhibit A hereto attached, the law is that unless employees in the position of plaintiffs have reached the retirement age at the time of the termination of their employment they cease to have any interest in the Trust Funds, where

the Plan continues in effect after the termination of their employment.

8. There is no issue as to any material fact and reasonable minds can come to but one conclusion and that is that the defendants-appellees are entitled to judgment as a matter of law; and the Motion for Summary Judgment filed by the plaintiffs should be overruled and the Motion for Summary Judgment filed by the defendants should be sustained.

9. The defendants are entitled to have the plaintiffs' petition dismissed and to recover judgment against the plaintiffs for their costs herein and in the Common Pleas Court.

10. Judgment should be entered for the defendants as in the Common Pleas Court.